

Corrina G. Freedman (State Bar No. 274438)  
 corrina.freedman@lw.com  
**LATHAM & WATKINS LLP**  
 355 South Grand Avenue  
 Los Angeles, California 90071-1560  
 Telephone: (213) 485-1234  
 Facsimile: (213) 891-8763

Mark S. Mester (*pro hac vice*)  
 mark.mester@lw.com  
 Kathleen P. Lally (*pro hac vice*)  
 kathleen.lally@lw.com  
**LATHAM & WATKINS LLP**  
 233 South Wacker Drive, Suite 5800  
 Chicago, Illinois 60606  
 Telephone: (312) 876-7700  
 Facsimile: (312) 993-9767

Attorneys for Defendants

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**(WESTERN DIVISION)**

THOMAS FLOWERS, On Behalf of  
 Himself and All Others Similarly  
 Situated,

Plaintiffs,

vs.

SCHIFF NUTRITION, SCHIFF  
 NUTRITION INTERNATIONAL  
 INC., SCHIFF NUTRITION GROUP,  
 INC., RECKITT BENCKISER  
 PHARMACEUTICALS INC., and  
 RECKITT BENCKISER NORTH  
 AMERICA, LLC,

Defendants.

Case No. 2:13-cv-09406-MWF-MRW  
CLASS ACTION

**DEFENDANTS' ANSWER AND  
 AFFIRMATIVE DEFENSES TO  
 PLAINTIFF'S CLASS ACTION  
 COMPLAINT**

Defendants Schiff Nutrition, Schiff Nutrition International Inc., Schiff  
 Nutrition Group, Inc., Reckitt Benckiser Pharmaceuticals Inc. and Reckitt  
 Benckiser North America, LLC (collectively, "Defendants"), as and for their  
 Answer and Affirmative Defenses to the Class Action Complaint of Plaintiff  
 Thomas Flowers ("Plaintiff"), state as follows:

1           1.     In response to the allegations of Paragraph 1, Defendants admit that  
 2 Plaintiff and his attorneys purport to bring this Complaint as a “class action [on]  
 3 behalf of himself and similarly-situated others who purchased health supplements  
 4 containing glucosamine and/or chondroitin manufactured and marketed by  
 5 Defendants . . . and sold under the brand name ‘Move Free.’” Defendants deny  
 6 that class treatment of Plaintiff’s claims is appropriate and that the definition and  
 7 description of the proposed class are appropriate or otherwise meet the applicable  
 8 requirements for class certification. Except as expressly admitted, Defendants  
 9 deny any and all remaining allegations in Paragraph 1.

10           2.     In response to the allegations of Paragraph 2, Defendants admit that  
 11 they and/or certain of their affiliates manufacture and market vitamins, nutritional  
 12 supplements, and sports nutrition products. Except as expressly admitted,  
 13 Defendants deny any and all remaining allegations in Paragraph 2.

14           3.     In response to the allegations in Paragraph 3, Defendants admit that  
 15 the vitamins, nutritional supplements and sports nutrition products manufactured  
 16 by them and/or certain of their affiliates are sold in retail stores in various states,  
 17 including in California. Except as expressly admitted, Defendants deny any and all  
 18 remaining allegations in Paragraph 3.

19           4.     In response to the allegations in Paragraph 4 and Footnote 1,  
 20 Defendants admit that they and/or certain of their affiliates manufacture, market  
 21 and sell joint health dietary supplements under the brand “Move Free,” which is  
 22 available in three different formulas: (1) Move Free® Advanced Triple Strength,  
 23 (2) Move Free® Advanced Triple Strength Plus MSM & Vitamin D and (3) Move  
 24 Free® Advanced Plus MSM (collectively, the “Move Free® Advanced Products”).  
 25 Defendants further admit that glucosamine and chondroitin sulfate are generally  
 26 ingredients in the Move Free® Advanced Products. Except as expressly admitted,  
 27 Defendants deny any and all remaining allegations in Paragraph 4 and Footnote 1.  
 28

1           **5.** In response to the allegations in Paragraph 5, Defendants admit that  
2 glucosamine and chondroitin sulfate are generally ingredients in the Move Free®  
3 Advanced Products. The individual advertising and marketing for the Move Free®  
4 Advanced Products speak for themselves, and to the extent that the allegations in  
5 Paragraph 5 vary therefrom, Defendants deny those allegations. Defendants deny  
6 that any advertising or marketing for the Move Free® Advanced Products was  
7 “uniform.” Except as expressly admitted, Defendants deny any and all remaining  
8 allegations in Paragraph 5.

9           **6.** In response to the allegations of Paragraph 6 and Footnote 2,  
10 Defendants admit that the Move Free® Advanced Products are joint health dietary  
11 supplements. Defendants are without knowledge or information sufficient to form  
12 a belief as to the truth or falsity of the allegations in Paragraph 6 and Footnote 2  
13 regarding the “most common symptoms of osteoarthritis,” and on that basis, deny  
14 those allegations. Except as expressly admitted, Defendants deny any and all  
15 remaining allegations in Paragraph 6 and Footnote 2.

16           **7.** In response to the allegations in Paragraph 7, Defendants deny all  
17 allegations therein.

18           **8.** In response to the allegations in Paragraph 8 and Footnote 3,  
19 Defendants state that the materials referenced in Paragraph 8 and Footnote 3 speak  
20 for themselves, and to the extent that the allegations in Paragraph 8 and Footnote 3  
21 vary therefrom or from the entirety of the referenced study and/or reports,  
22 Defendants deny those allegations. Defendants deny any and all remaining  
23 allegations in Paragraph 8 and Footnote 3.

24           **9.** In response to the allegations in Paragraph 9, Defendants deny all  
25 allegations therein.

26           **10.** In response to the allegations in Paragraph 10, Defendants deny all  
27 allegations therein.

28

1           **11.** In response to the allegations in Paragraph 11, Defendants deny all  
2 allegations therein and specifically deny (a) that class treatment of Plaintiff's  
3 claims is appropriate; (b) that the definition and description of the proposed class  
4 are appropriate or otherwise meet the applicable requirements for class  
5 certification; and (c) that Plaintiff and members of the proposed class are entitled  
6 to any relief whatsoever, including but not limited to the relief requested in  
7 Plaintiff's Complaint.

8           **12.** In response to the allegations in Paragraph 12, Defendants admit that  
9 Plaintiff purports to bring "this action on behalf of himself and all other similarly  
10 situated consumers in California." Defendants further admit that Plaintiff purports  
11 to seek injunctive and monetary relief. Defendants deny that class treatment of  
12 Plaintiff's claims is appropriate and that the definition and description of the  
13 proposed class are appropriate or otherwise meet the applicable requirements for  
14 class certification. Defendants further deny that they have engaged in any wrong-  
15 doing whatsoever, including but not limited to making false and misleading  
16 statements, violating California's unfair competition law and breaching express  
17 warranties. Defendants further deny that Plaintiff and members of the proposed  
18 class are entitled to any relief whatsoever, including but not limited to the relief  
19 requested in Plaintiff's Complaint. Except as expressly admitted, Defendants deny  
20 any and all remaining allegations in Paragraph 12.

21           **13.** In response to the allegations in Paragraph 13, Defendants admit that  
22 Plaintiff purports to invoke this Court's jurisdiction pursuant to 28 U.S.C. §  
23 1332(d)(2) and that jurisdiction would appear to be properly established for this  
24 suit. Except as expressly admitted, Defendants deny any and all remaining  
25 allegations in Paragraph 13.

26           **14.** In response to the allegations of Paragraph 14, Defendants admit the  
27 allegations therein.

28

1           **15.** In response to the allegations in Paragraph 15, Defendants admit that  
2 Plaintiff purports to establish that venue is proper under 28 U.S.C. §§ 1391(a) and  
3 (b) and 18 U.S.C. § 1965(a). Defendants further admit that they transact business  
4 within California. Defendants are without knowledge or information sufficient to  
5 form a belief as to the truth or falsity of the allegations in Paragraph 15 regarding  
6 the residence of Plaintiff and members of the proposed class, and on that basis,  
7 deny those allegations. Defendants deny that they have engaged in misleading  
8 advertising in this District or anywhere else. Except as expressly admitted,  
9 Defendants deny any and all remaining allegations in Paragraph 15.

10           **16.** In response to the allegations in Paragraph 16, Defendants are without  
11 knowledge or information sufficient to form a belief as to the truth or falsity of the  
12 allegations in Paragraph 16, and on that basis, deny those allegations. Defendants  
13 further deny that Plaintiff is entitled to any relief whatsoever, including but not  
14 limited to the relief requested in Plaintiff's Complaint. Defendants deny any and  
15 all remaining allegations in Paragraph 16.

16           **17.** In response to the allegations in Paragraph 17, Defendants admit that  
17 they and/or certain of their affiliates manufacture, market and sell the Move Free®  
18 Advanced Products throughout the United States. Except as expressly admitted,  
19 Defendants deny any and all remaining allegations in Paragraph 17.

20           **18.** In response to the allegations in Paragraph 18 and Footnote 4,  
21 Defendants admit that Plaintiff's Complaint purports to concern the Move Free®  
22 Advanced Products manufactured, marketed and sold by them and/or certain of  
23 their affiliates. Defendants further admit that the Move Free® Advanced Products  
24 come in different dosages and sizes. Except as expressly admitted, Defendants  
25 deny any and all remaining allegations in Paragraph 18 and Footnote 4.

26           **19.** In response to the allegations in Paragraph 19, Defendants admit that  
27 they and/or certain of their affiliates market the Move Free® Advanced Products.  
28

1 Except as expressly admitted, Defendants deny any and all remaining allegations  
2 in Paragraph 19.

3       **20.** In response to the allegations in Paragraph 20, Defendants state that  
4 the material referenced in Paragraph 20 speaks for itself, and to the extent that the  
5 allegations in Paragraph 20 vary therefrom, Defendants deny those allegations.  
6 Defendants deny any and all remaining allegations in Paragraph 20.

7       **21.** In response to the allegations in Paragraph 21, Defendants admit that  
8 glucosamine and chondroitin sulfate are generally ingredients in the Move Free®  
9 Advanced Products. Defendants further admit that glucosamine is an amino sugar  
10 that the body produces and distributes in cartilage and other connective tissue.  
11 Defendants further admit that chondroitin sulfate is a sulfated glycosaminoglycan  
12 found in the body's connective tissues. Except as expressly admitted, Defendants  
13 deny any and all remaining allegations in Paragraph 21.

14       **22.** In response to the allegations in Paragraph 22, Defendants deny all  
15 allegations therein.

16       **23.** In response to the allegations in Paragraph 23, Defendants deny all  
17 allegations therein.

18       **24.** In response to the allegations in Paragraph 24, Defendants state that  
19 the packaging and labeling for the Move Free® Advanced Products speak for  
20 themselves, and to the extent that the allegations in Paragraph 24 vary therefrom,  
21 Defendants deny those allegations. Defendants deny any and all remaining  
22 allegations in Paragraph 24.

23       **25.** In response to the allegations in Paragraph 25, Defendants deny all  
24 allegations therein.

25       **26.** In response to the allegations in Paragraph 26, Defendants deny all  
26 allegations therein.

27       **27.** In response to the allegations in Paragraph 27, Defendants state that  
28 the material referred to in Paragraph 27 speaks for itself, and to the extent that the

1 allegations in Paragraph 27 vary therefrom or from the entirety of the referenced  
2 study and/or reports, Defendants deny those allegations. Defendants deny any and  
3 all remaining allegations in Paragraph 27.

4 **28.** In response to the allegations in Paragraph 28, Defendants state that  
5 the material referred to in Paragraph 28 speaks for itself, and to the extent that the  
6 allegations in Paragraph 28 vary therefrom or from the entirety of the referenced  
7 studies and/or reports, Defendants deny those allegations. Defendants deny any  
8 and all remaining allegations in Paragraph 28.

9 **29.** In response to the allegations in Paragraph 29 and Footnote 5,  
10 Defendants state that the materials referred to in Paragraph 29 and Footnote 5  
11 speak for themselves, and to the extent that the allegations in Paragraph 29 and  
12 Footnote 5 vary therefrom or from the entirety of the referenced study and/or  
13 reports, Defendants deny those allegations. Defendants deny any and all remaining  
14 allegations in Paragraph 29 and Footnote 5.

15 **30.** In response to the allegations in Paragraph 30, Defendants state that  
16 the GAIT studies, their conclusions and any other unnamed “reported results of  
17 other studies” speak for themselves, and to the extent that the allegations in  
18 Paragraph 30 vary therefrom or from the entirety of those studies and/or reports,  
19 Defendants deny those allegations. Defendants deny any and all remaining  
20 allegations in Paragraph 30.

21 **31.** In response to the allegations in Paragraph 31, Defendants state that  
22 the material referred to in Paragraph 31 speaks for itself, and to the extent that the  
23 allegations in Paragraph 31 vary therefrom or from the entirety of the referenced  
24 study and/or report, Defendants deny those allegations. Defendants deny any and  
25 all remaining allegations in Paragraph 31.

26 **32.** In response to the allegations in Paragraph 32, Defendants state that  
27 the material referred to in Paragraph 32 speaks for itself, and to the extent that the  
28 allegations in Paragraph 32 vary therefrom or from the entirety of the referenced



1 study and/or report, Defendants deny those allegations. Defendants deny any and  
2 all remaining allegations in Paragraph 32.

3 **33.** In response to the allegations in Paragraph 33, Defendants state that  
4 the material referred to in Paragraph 33 speaks for itself, and to the extent that the  
5 allegations in Paragraph 33 vary therefrom or from the entirety of the referenced  
6 study and/or report, Defendants deny those allegations. Defendants deny any and  
7 all remaining allegations in Paragraph 33.

8 **34.** In response to the allegations in Paragraph 34, Defendants state that  
9 the material referred to in Paragraph 34 speaks for itself, and to the extent that the  
10 allegations in Paragraph 34 vary therefrom or from the entirety of the studies  
11 and/or reports being summarized, Defendants deny those allegations. Defendants  
12 deny any and all remaining allegations in Paragraph 34.

13 **35.** In response to the allegations in Paragraph 35, Defendants state that  
14 the material referred to in Paragraph 35 speaks for itself, and to the extent that the  
15 allegations in Paragraph 35 vary therefrom or from the entirety of the referenced  
16 studies and/or reports, Defendants deny those allegations. Defendants deny any  
17 and all remaining allegations in Paragraph 35.

18 **36.** In response to the allegations in Paragraph 36, Defendants state that  
19 the materials referred to in Paragraph 36 speak for themselves, and to the extent  
20 that the allegations in Paragraph 36 vary therefrom or from the entirety of the  
21 referenced studies and/or reports, Defendants deny those allegations. Defendants  
22 deny any and all remaining allegations in Paragraph 36.

23 **37.** In response to the allegations in Paragraph 37, Defendants do not  
24 answer for “Doctor’s Best.” Defendants deny any and all remaining allegations in  
25 Paragraph 37.

26 **38.** In response to the allegations in Paragraph 38, Defendants state that  
27 the material referred to in Paragraph 38 speaks for itself, and to the extent that the  
28 allegations in Paragraph 38 vary therefrom or from the entirety of the referenced



1 study and/or reports, Defendants deny those allegations. Defendants deny any and  
2 all remaining allegations in Paragraph 38.

3 **39.** In response to the allegations in Paragraph 39, Defendants state that  
4 the material referred to in Paragraph 39 speaks for itself, and to the extent that the  
5 allegations in Paragraph 39 vary therefrom or from the entirety of the referenced  
6 study and/or report, Defendants deny those allegations. Defendants deny any and  
7 all remaining allegations in Paragraph 39.

8 **40.** In response to the allegations in Paragraph 40, Defendants deny all  
9 allegations therein.

10 **41.** In response to the allegations in Paragraph 41, Defendants deny all  
11 allegations therein.

12 **42.** In response to the allegations in Paragraph 42, Defendants deny all  
13 allegations therein.

14 **43.** In response to the allegations in Paragraph 43, Defendants are without  
15 knowledge or information sufficient to form a belief as to the truth or falsity of the  
16 allegations in Paragraph 43 regarding Plaintiff's purchases and consumption as  
17 well as Plaintiff's consideration of any advertising or marketing, and on that basis,  
18 denies those allegations. Defendants deny any and all remaining allegations in  
19 Paragraph 43.

20 **44.** In response to the allegations in Paragraph 44, Defendants are without  
21 knowledge or information sufficient to form a belief as to the truth or falsity of the  
22 allegations in Paragraph 44 regarding the reasons Plaintiff and members of the  
23 proposed class purchased the Move Free® Advanced Products, and on that basis,  
24 denies those allegations. Defendants deny any and all remaining allegations in  
25 Paragraph 44 and specifically deny that class treatment of Plaintiff's claims is  
26 appropriate and that the definition and description of the proposed class are  
27 appropriate or otherwise meet the applicable requirements for class certification.

28

1           **45.** In response to the allegations in Paragraph 45, Defendants deny all  
2 allegations therein and specifically deny (a) that class treatment of Plaintiff's  
3 claims is appropriate; (b) that the definition and description of the proposed class  
4 are appropriate or otherwise meet the applicable requirements for class  
5 certification; and (c) that Plaintiff and members of the proposed class are entitled  
6 to any relief whatsoever, including but not limited to the relief requested in  
7 Plaintiff's Complaint.

8           **46.** In response to the allegations in Paragraph 46, Defendants deny all  
9 allegations therein.

10           **47.** In response to the allegations in Paragraph 47, Defendants admit that  
11 Plaintiff purports to bring this Complaint on behalf of the class identified in  
12 Paragraph 47. Defendants deny that class treatment of Plaintiff's claims is  
13 appropriate and that the definition and description of the proposed class are  
14 appropriate or otherwise meet the applicable requirements for class certification.  
15 Except as expressly admitted, Defendants deny any and all remaining allegations  
16 in Paragraph 47.

17           **48.** In response to the allegations in Paragraph 48, Defendants admit that  
18 Plaintiff purports to reserve the right to modify or amend the class definition stated  
19 in Paragraph 47. Defendants deny that class treatment of Plaintiff's claims is  
20 appropriate and that the definition and description of the proposed class are  
21 appropriate or otherwise meet the applicable requirements for class certification.  
22 Except as expressly admitted, Defendants deny any and all remaining allegations  
23 in Paragraph 48.

24           **49.** In response to the allegations in Paragraph 49, Defendants deny all  
25 allegations therein and specifically deny that class treatment of Plaintiff's claims is  
26 appropriate.  
27  
28

1           **50.** In response to the allegations in Paragraph 50, Defendants deny all  
2 allegations therein and specifically deny that class treatment of Plaintiff's claims is  
3 appropriate.

4           **51.** In response to the allegations in Paragraph 51, Defendants are without  
5 knowledge or information sufficient to form a belief as to the truth or falsity of the  
6 allegations in Paragraph 51 regarding Plaintiff, his purchases and his membership  
7 in the proposed class, and on that basis, deny those allegations. Defendants deny  
8 any and all remaining allegations in Paragraph 51 and specifically deny that class  
9 treatment of Plaintiff's claims is appropriate.

10           **52.** In response to the allegations in Paragraph 52, Defendants are without  
11 knowledge or information sufficient to form a belief as to the truth or falsity of the  
12 allegations in Paragraph 52 regarding Plaintiff and his counsel, and on that basis,  
13 deny those allegations. Defendants deny any and all remaining allegations in  
14 Paragraph 52 and specifically deny that class treatment of Plaintiff's claims is  
15 appropriate.

16           **53.** In response to the allegations in Paragraph 53, Defendants deny all  
17 allegations therein and specifically deny that class treatment of Plaintiff's claims is  
18 appropriate.

19           **54.** In response to the allegations in Paragraph 54, Defendants deny all  
20 allegations therein and specifically deny that class treatment of Plaintiff's claims is  
21 appropriate.

22           **55.** In response to the allegations in Paragraph 55, Defendants are without  
23 knowledge or information sufficient to form a belief as to the truth or falsity of the  
24 allegations in Paragraph 55 regarding Plaintiff's knowledge, and on that basis,  
25 deny those allegations. Defendants deny any and all remaining allegations in  
26 Paragraph 55 and specifically deny that class treatment of Plaintiff's claims is  
27 appropriate.

28

1           **56.** In response to the allegations in Paragraph 56, Defendants deny all  
2 allegations therein and specifically deny that class treatment of Plaintiff's claims is  
3 appropriate.

4           **57.** In response to the allegations in Paragraph 57, Defendants deny all  
5 allegations therein and specifically deny that class treatment of Plaintiff's claims is  
6 appropriate.

7           **58.** In response to the allegations in Paragraph 58, Defendants deny all  
8 allegations therein and specifically deny that class treatment of Plaintiff's claims is  
9 appropriate.

10          **59.** In response to the allegations in Paragraph 59, Defendants repeat and  
11 restate the answers set forth above as if fully stated herein.

12          **60.** In response to the allegations in Paragraph 60, Defendants deny all  
13 allegations therein.

14          **61.** In response to the allegations in Paragraph 61, Defendants deny all  
15 allegations therein.

16          **62.** In response to the allegations in Paragraph 62, Defendants deny all  
17 allegations therein.

18          **63.** In response to the allegations in Paragraph 63, Defendants deny all  
19 allegations therein and specifically deny (a) that class treatment of Plaintiff's  
20 claims is appropriate; (b) that the definition and description of the proposed class  
21 are appropriate or otherwise meet the applicable requirements for class  
22 certification; and (c) that Plaintiff and members of the proposed class are entitled  
23 to any relief whatsoever, including but not limited to the relief requested in  
24 Plaintiff's Complaint.

25          **64.** In response to the allegations in Paragraph 64, Defendants repeat and  
26 restate the answers set forth above as if fully stated herein.

27          **65.** In response to the allegations in Paragraph 65, Defendants deny all  
28 allegations therein.

1           **66.** In response to the allegations in Paragraph 66, Defendants deny all  
2 allegations therein.

3           **67.** In response to the allegations in Paragraph 67, Defendants deny all  
4 allegations therein.

5           **68.** In response to the allegations in Paragraph 68, Defendants deny all  
6 allegations therein.

7           **69.** In response to the allegations in Paragraph 69, Defendants deny all  
8 allegations therein.

9           **70.** In response to the allegations in Paragraph 70, Defendants deny all  
10 allegations therein.

11           **71.** In response to the allegations in Paragraph 71, Defendants deny all  
12 allegations therein and specifically deny (a) that class treatment of Plaintiff's  
13 claims is appropriate; (b) that the definition and description of the proposed class  
14 are appropriate or otherwise meet the applicable requirements for class  
15 certification; and (c) that Plaintiff and members of the proposed class are entitled  
16 to any relief whatsoever, including but not limited to the relief requested in  
17 Plaintiff's Complaint.

18           **72.** In response to the allegations in Paragraph 72, Defendants repeat and  
19 restate the answers set forth above as if fully stated herein.

20           **73.** In response to the allegations in Paragraph 73, Defendants admit that  
21 Plaintiff purports to plead a cause of action for unjust enrichment in the alternative.  
22 Defendants deny that Plaintiff and members of the proposed class are entitled to  
23 any relief whatsoever, including but not limited to the relief requested in Plaintiff's  
24 Complaint. Except as expressly admitted, Defendants deny any and all remaining  
25 allegations in Paragraph 73.

26           **74.** In response to the allegations in Paragraph 74, Defendants deny all  
27 allegations therein.  
28

**75.** In response to the allegations in Paragraph 75, Defendants deny all allegations therein and specifically deny (a) that class treatment of Plaintiff's claims is appropriate; (b) that the definition and description of the proposed class are appropriate or otherwise meet the applicable requirements for class certification; and (c) that Plaintiff and members of the proposed class are entitled to any relief whatsoever, including but not limited to the relief requested in Plaintiff's Complaint.

**[Paragraph entitled “Prayer for Relief”]** In response to the allegations in the Prayer for Relief, Defendants deny the allegations in the Prayer for Relief and specifically deny (a) that class treatment of Plaintiff’s claims is appropriate; (b) that the definition and description of the proposed class are appropriate or otherwise meet the applicable requirements for class certification; and (c) that Plaintiff and members of the proposed class are entitled to any relief whatsoever, including but not limited to the relief requested in Plaintiff’s Complaint.

**[Paragraph entitled “Jury Demand”]** In response to the allegations in the Demand for Jury Trial, Defendants admit that Plaintiff purports to demand a jury trial for his claims. Defendants deny any and all remaining allegations in the Demand for Jury Trial.

## AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiff's alleged claims for relief, Defendants allege as follows. By setting forth the following allegations and defenses, however, Defendants do not assume the burden of proof on matters and issues other than those on which Defendants have the burden of proof as a matter of law.

## First Affirmative Defense (Settlement)

**76.** A putative class action involving the same or similar claims and products has been pending in the United States District Court for the Southern

District of California for nearly three years, namely, Lerma, et al. v. Schiff, Case No. 3:11-cv-01056-CAB-MDD (S.D. Cal. filed May 13, 2011). The proposed classes in Lerma subsume the proposed class in this case. The parties in Lerma reached agreement on the terms of a class settlement, subject to agreement on a written settlement agreement and preliminary and final approval by the court in Lerma, and are moving for preliminary approval in the near future. If the proposed settlement in Lerma is approved by the court, however, it will serve to bar the claims of Plaintiff and the proposed class in this case.

### **Second Affirmative Defense**

#### **(Statute of Limitations)**

77. Defendants are informed and believe, and on that basis allege, that the claims of Plaintiff and/or of the members of the proposed class are barred, in whole or in part, by the applicable statute of limitations.

### **Third Affirmative Defense**

#### **(Laches)**

78. Defendants are informed and believe, and on that basis allege, that because of delay by Plaintiff and/or members of the proposed class in asserting their alleged claims, such claims are barred, in whole or in part, by the equitable doctrine of laches.

### **Fourth Affirmative Defense**

#### **(Estoppel)**

79. Defendants are informed and believe, and on that basis allege, that by reason of the conduct of Plaintiff and/or members of the proposed class, the purported claims for relief alleged in the Complaint are barred, in whole or in part, by the doctrine of estoppel.



**Fifth Affirmative Defense**

**(Waiver)**

80. Defendants are informed and believe, and on that basis allege, that by reason of the conduct of Plaintiff and/or members of the proposed class, the purported claims for relief alleged in the Complaint are barred, in whole or in part, by the doctrine of waiver.

**Sixth Affirmative Defense**

**(Unclean Hands)**

81. Defendants are informed and believe, and on that basis allege, that by reason of the conduct of Plaintiff and/or members of the proposed class, the purported claims for relief alleged in the Complaint are barred, in whole or in part, by the doctrine of unclean hands.

**Seventh Affirmative Defense**

**(Preemption)**

82. Defendants' actual actions, business practices, and representations are proper under relevant federal regulations, and therefore, the claims of Plaintiff and/or the members of the proposed class are preempted by the doctrine of preemption and the Supremacy Clause of the United States Constitution.

**Eighth Affirmative Defense**

**(Class Action Improper)**

83. Class treatment is inappropriate for this action because, inter alia, Plaintiff is not an adequate representative, Plaintiff's claims are not typical or common of claims of proposed class members, the claims of Plaintiff and members of the proposed class are subject to unique facts and defenses (such as individual purchasing decisions), common questions of law and fact do not predominate over any common issues, class treatment is not superior to other available methods of determining the controversy and a class action would be unmanageable.

Moreover, certification of the proposed class would result in the denial of due process to Defendants as well as to the proposed class.

**Ninth Affirmative Defense**

**(UCL – No Relief)**

**84.** The claims of Plaintiff and/or the members of the proposed class for relief under California’s Unfair Competition Law is barred, in whole or in part, because Plaintiff seeks relief to which he is not entitled under the law.

**Tenth Affirmative Defense**

**(Safe Harbor)**

**85.** The claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part, by the doctrine set forth in Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163 (1999).

**Eleventh Affirmative Defense**

**(Conduct Not Unlawful)**

**86.** The claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part, because Defendants’ conduct was not unlawful.

**Twelfth Affirmative Defense**

**(Conduct Not Unfair)**

**87.** The claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part, because Defendants’ conduct was not unfair.

**Thirteenth Affirmative Defense**

**(No Fraud/Deception)**

**88.** The claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part, because none of Defendants’ actions and/or statements were likely to mislead the reasonable consumer, and Plaintiff and/or members of the proposed class were not actually misled.

**Fourteenth Affirmative Defense**

**(No Misleading or Deceptive Advertising)**

**89.** The claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part, because Defendants did not engage in any conduct that could constitute misleading or deceptive advertising.

**Fifteenth Affirmative Defense**

**(No Reliance)**

**90.** Defendants are informed and believe, and on that basis allege, that the claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part, because Plaintiff and/or members of the proposed class were not actually misled or deceived by and/or did not rely on any statements or omissions on the part of Defendants in deciding whether to purchase Move Free® Advance Products.

**Sixteenth Affirmative Defense**

**(Prior Substantiation)**

**91.** The claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part, because any statements, communications, advertising or any other representations alleged to have been made by Defendants regarding the Move Free® Advanced Products were supported by prior substantiation.

**Seventeenth Affirmative Defense**

**(Adequate Remedy At Law)**

**92.** The claims of Plaintiff and/or the members of the proposed class for equitable relief are barred, in whole or in part, because Plaintiff and/or members of the proposed class have an adequate remedy at law.

**Eighteenth Affirmative Defense**

**(No Legal Injury)**

**93.** Defendants are informed and believe, and on that basis allege, that to the extent that Plaintiff and/or members of the proposed class suffered no legal

1 injury, the claims of Plaintiff and/or the members of the proposed class are barred,  
2 in whole or in part.

### 3 **Nineteenth Affirmative Defense**

#### 4 **(Release)**

5 **94.** Defendants are informed and believe, and on that basis allege, that to  
6 the extent Plaintiff and/or members of the proposed class have released the claims  
7 asserted in Plaintiff's Complaint, the claims of Plaintiff and/or the members of the  
8 proposed class are barred, in whole or in part.

### 9 **Twentieth Affirmative Defense**

#### 10 **(Prior Judgment)**

11 **95.** Defendants are informed and believe, and on that basis allege, that to  
12 the extent that Plaintiff and/or members of the proposed class have brought actions  
13 and received judgments or awards on the claims asserted herein, the claims of  
14 Plaintiff and/or the members of the proposed class are barred, in whole or in part.

### 15 **Twenty-First Affirmative Defense**

#### 16 **(Accord and Satisfaction)**

17 **96.** Defendants are informed and believe, and on that basis allege, that to  
18 the extent that Plaintiff and/or members of the proposed class have resolved the  
19 same or similar claims as that alleged in Plaintiff's Complaint, the claims of  
20 Plaintiff and/or the members of the proposed class are barred, in whole or in part,  
21 by the doctrine of accord and satisfaction.

### 22 **Twenty-Second Affirmative Defense**

#### 23 **(Res Judicata/Collateral Estoppel)**

24 **97.** Defendants are informed and believe, and on that basis allege, that to  
25 the extent that Plaintiff and/or members of the proposed class have previously  
26 litigated the same or similar claims as that alleged in Plaintiff's Complaint, the  
27 claims of Plaintiff and/or the members of the proposed class are barred, in whole or  
28 in part, by the doctrines of res judicata and/or collateral estoppel.

**Twenty-Third Affirmative Defense**

**(Comparative Fault)**

98. Defendants are informed and believe, and on that basis allege, that to the extent that any alleged injuries and damages of Plaintiff and/or members of the proposed class were proximately caused, in whole or in part, by their own acts or omissions or those of third parties, any recovery by Plaintiff and/or members of the proposed class should be barred or reduced by an amount proportionate to the amount by which their own conduct or that of third parties contributed to their alleged injuries.

**Twenty-Fourth Affirmative Defense**

**(Lack of Causation)**

99. Defendants are informed and believe, and on that basis allege, that to the extent that Defendants did not directly or proximately cause or contribute to any damage, loss or injury allegedly sustained by Plaintiff and/or members of the proposed class or that Plaintiff and/or members of the proposed class seek to recover in this action, the claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part.

**Twenty-Fifth Affirmative Defense**

**(Intervening or Superseding Cause)**

100. Defendants are informed and believe, and on that basis allege, that to the extent that any damage, loss or injury allegedly sustained by Plaintiff and/or members of the proposed class was directly or proximately caused by independent intervening and superseding causes, the claims of Plaintiff and/or the members of the proposed class are barred, in whole or in part.

**Twenty-Sixth Affirmative Defense**

**(Mitigation of Damages)**

101. Defendants are informed and believe, and on that basis allege, that to the extent that Plaintiff and/or members of the proposed class failed to mitigate

1 their damages, the claims of Plaintiff and/or the members of the proposed class are  
2 barred, in whole or in part.

3 **Twenty-Seventh Affirmative Defense**

4 **(Speculative Damages)**

5 **102.** Defendants are informed and believe, and on that basis allege, due to  
6 the speculative and uncertain nature of the alleged damages, harm, injury, or loss,  
7 the claims of Plaintiff and/or the members of the proposed class are barred, in  
8 whole or in part.

9 **Twenty-Eighth Affirmative Defense**

10 **(Offset)**

11 **103.** Defendants are informed and believe, and on that basis allege, that the  
12 Complaint and the claim for damages and/or other monetary recovery by Plaintiff  
13 and/or members of the proposed class must be offset and reduced by the value  
14 received from the Move Free® Advanced Products that they allegedly purchased.

15 **Twenty-Ninth Affirmative Defense**

16 **(No Punitive Damages)**

17 **104.** Defendants are informed and believe, and on that basis allege, that as  
18 to the Complaint and the purported cause of action alleged therein, although  
19 Defendants deny that they committed or are responsible for any act or omission  
20 that could support the recovery of punitive damages in this action, if and to the  
21 extent any such act or omission is found, recovery of such punitive damages  
22 against Defendants are unconstitutional under the constitutions of the United States  
23 and applicable state law. Additionally, any applicable state law provisions  
24 allowing the imposition of punitive damages may be facially unconstitutional or  
25 unconstitutional as applied to the extent that: (i) they deny equal protection of the  
26 law by providing fewer protections for civil litigants than criminal statutes that  
27 provide for the imposition of monetary fines; (ii) they allow for the imposition of  
28

an excessive fine; and/or (iii) they allow for the deprivation of property without due process of law.

### **Other Affirmative Defenses**

Defendants specifically give notice that they intend to rely upon such other defenses as may become available by law, or pursuant to statute, or by virtue of any proceedings in this case, and hereby reserves the right to amend their Answer to assert such defenses.

### **PRAYER FOR RELIEF**

WHEREFORE, Defendants pray as follows:

1. That Plaintiff takes nothing by his Complaint and that the Complaint be dismissed with prejudice;
2. That Defendants be awarded their costs, disbursements and attorneys' fees; and
3. For such other and further relief as the Court deems just and proper.

DATED: March 3, 2014

Respectfully submitted,

By: /s/Kathleen P. Lally

Kathleen P. Lally  
One of the attorneys for Defendants

Corrina G. Freedman (State Bar No. 274438)

corrina.freedman@lw.com

**LATHAM & WATKINS LLP**

355 South Grand Avenue

Los Angeles, California 90071-1560

Telephone: (213) 485-1234

Facsimile: (213) 891-8763

Mark S. Mester (*pro hac vice*)

mark.mester@lw.com

Kathleen P. Lally (*pro hac vice*)

kathleen.lally@lw.com

**LATHAM & WATKINS LLP**

233 South Wacker Drive, Suite 5800

Chicago, Illinois 60606

Telephone: (312) 876-7700

Facsimile: (312) 993-9767



1 **PROOF OF SERVICE**

2 I am employed in the County of Cook, State of Illinois. I am over the age of  
3 18 years and not a party to this action. My business address is Latham & Watkins  
LLP, 233 South Wacker Drive, Suite 5800, Chicago, Illinois, 60606.

4 On March 3, 2014, I served the preceding document described as:

5 **DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO**  
6 **PLAINTIFF'S CLASS ACTION COMPLAINT**

7 By serving true copies of the above-described document in the following manner:

8 **BY FEDEX**

9 I am familiar with the office practice of Latham & Watkins LLP for  
10 collecting and processing packages for delivery by FedEx, which practice is that  
when packages are deposited with the Latham & Watkins LLP personally  
responsible for depositing packages with FedEx, such packages are picked up by a  
representative of FedEx that same day in the ordinary course of business.

11 Edwin J. Kilpela Jr. (pro hac pending)  
12 200 First Ave., Suite 300  
Pittsburg, PA 15222

13 R. Bruce Carlson (pro hac pending)  
14 Stephanie Goldin (pro hac pending)  
15 Jamisen Etzel (pro hac pending)  
CARLSON LUNCH LTD  
16 PNC Park  
115 Federal St., Suite 201  
17 Pittsburg, PA 15212

18 **BY ELECTRONIC FILING**

19 I electronically filed the above-described document with the Clerk of the  
20 Court using the CM/ECF system, which will send notification of such filing to the  
e-mail addresses denoted on the Court's Electronic Mail Notice List.

21  
22 I declare that I am permitted to practice before this Court and declare under  
23 penalty of perjury under the laws of the State of Illinois that the foregoing is true  
and correct.

24 Executed on March 3, 2104, in Chicago, Illinois.

25 By: /s/Kathleen P. Lally

26 Kathleen P. Lally  
27 One of the attorneys for Defendants  
28